Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-247

OSCAR GRUSS and OSCAR GRUSS & SON,

Petitioners,

—against—

THE CURTIS PUBLISHING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Oscar Gruss and Oscar Gruss & Son,

Petitioners,

—against—

The Curtis Publishing Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of *certiorari* issue to review the judgment entered on April 21, 1976, by the United States Court of Appeals for the Second Circuit, which judgment reversed a judgment of the United States District Court for the Southern District of New York in favor of petitioner Oscar Gruss, with instructions to dismiss the complaint served and filed by the petitioners.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, filed April 21, 1976, has been officially reported as *Oscar Gruss,* plaintiff-appellee and *Oscar Gruss & Son,* plaintiff versus *The Curtis Publishing Company,* defendant-appellant, 534 F.2d 1396. A copy thereof is set

forth in Appendix "A" hereto. The opinion of the United States District Court for the Southern District of New York, upon which its judgment in favor of Gruss was based, has not been officially reported, but its findings and conclusions are set forth in a memorandum dated March 21, 1975 which is set forth in Appendix "B" hereto. Respondent moved the District Court to amend its findings and conclusions and for a new trial. By memorandum and order dated August 25, 1975, which is set forth in Appendix "C" hereto and has not been officially reported, the District Court denied a new trial, adhered to its original findings and conclusions and set forth supplementary findings and conclusions. The District Court's judgment is set forth in Appendix "D" hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 21, 1976. By order of said Court dated April 30, 1976, the time to file a petition for a rehearing was extended to and including May 19, 1976. On May 19, 1976, petitioner Oscar Gruss duly filed a petition to the Court of Appeals for the Second Circuit for a rehearing, which petition was denied by order dated June 1, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May federal courts abstain from exercising diversity jurisdiction because they do not approve of plaintiffs' election of a federal forum over a state forum?

2. Are appraisal rights of dissenting shareholders jeopardized and are the policy and language of the federal securities acts controverted by a holding that corporate issuers need not explain in proxy material that beneficial shareholders can lose such rights unless they exercise them through registered holders?

3. When the ability of dissenting shareholders to effectively exercise rights of appraisal depends upon the fortuity of whether the issuer is incorporated in a state where courts have acted to protect those rights, has the congressional intent of uniform protection of investors, under the federal securities laws, been thwarted?

4. Should a gross miscarriage of justice, based upon a clearly erroneous decision, be permitted to stand?

Statutes, Rules and Regulations Involved

The following statutes, rules and regulations are involved in this case:

28 U.S.C. §1332; §§2(18), 515 and 810 of the Pennsylvania Business Corporation Law; §14(a) of the Securities Exchange Act of 1934; SEC Regulation 240.14(a), Schedule 14A item 2; SEC Rule 14a-5(a); and SEC Rule 14a-9(a).

These statutes, rules and regulations are set forth in Appendix "E" hereto.

Statement of the Case

Respondent The Curtis Publishing Company ("Curtis"), a Pennsylvania Corporation with its principal place of business in that State, effected a recapitalization on September 14, 1972 which gave rise to dissenting shareholders' rights of appraisal under the Pennsylvania Corporation Law (the "PCL"). Petitioner Oscar Gruss ("Gruss"), a resident of New York State, was the beneficial owner of Curtis stock, and petitioner Oscar Gruss & Son ("Gruss & Son"), a partnership engaged in the securities business with its place of business in New York City, was the registered owner.

Gruss sought to exercise his appraisal rights by following the procedure set forth in the proxy material issued by Curtis. Curtis, however, refused to recognize his appraisal rights,* claiming that the initial objection to the plan of recapitalization had been made by Gruss, as the beneficial owner of the Curtis stock, rather than by Gruss & Son, the registered owner, as required under the PCL. Curtis' position was extremely technical because, although the letter containing the objection was from Gruss, it was typed on the letterhead of Gruss & Son and expressly stated that Gruss & Son was the registered owner. The proxy material did not explain that the objection could be made only by a registered owner.

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* Curtis informed the petitioners that it did not recognize their appraisal rights and, accordingly, did not make an offer to them as and for the fair value of their stock, did not provide them with a balance sheet and profit and loss statement of the corporation, and did not provide them with notice that the plan had become effective all as required under the appraisal statutes. (PCL §515D)

Since the petitioners could not predict whether Pennsylvania courts would uphold Curtis' hypertechnical grounds for refusing to recognize their appraisal rights, they commenced the instant action in the United States District Court for the Southern District of New York (the "District Court") alleging that either (1) Curtis wrongfully refused to recognize Gruss' appraisal rights (the "State claim") or (2) if such refusal was not wrongful, Gruss lost his appraisal rights because, in describing the procedure for exercising appraisal rights without distinguishing between registered and beneficial shareholders, Curtis' proxy material was misleading in violation of the proxy rules under the Securities Exchange Act of 1934* (the "Federal claim"). Since the federal courts had exclusive jurisdiction over the Federal claim, Gruss could not have asserted both claims unless he brought this action in a federal court.

The proxy material stated that under Section 515 of the PCL, in order to exercise rights of appraisal, "holders of shares" were required to file a written objection to the plan before the meeting. However, it omitted to state that Section 2(18) of the PCL defined the word "shareholder" as the "registered owner of the shares," providing the basis for Curtis' contention that the objection had to be from the registered shareholder. Moreover, while containing as an exhibit the exact language of Section 515 of the PCL, the proxy material did not state, paraphrase or even mention Section 2(18), the section defining the term "share-

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* SEC Regulation 240.14(a), Schedule 14A, item 2 specifically requires that proxy statements include a description of the procedure for obtaining appraisal rights, and SEC Rules 14a-5(a) and 14a-9(a) require the information in proxy statements to be "clearly presented" and not "misleading". These rules and regulations are set forth in Appendix "E" hereto.

holder" (A*366-407). From a reading of the proxy material, therefore, a beneficial holder of shares would have no way of knowing that he could not exercise his appraisal rights by filing the written objection but that he was required to cause a registered holder to file it on his behalf.

The District Court's jurisdiction over the State Claim was based on diversity of citizenship and the principles of pendent jurisdiction. Jurisdiction over the Federal Claim was involved because under the Securities Exchange Act of 1934 (the "Act") federal courts have exclusive jurisdiction over disputes arising thereunder. (§27 of the Act)

After trial, the District Court found, as contended by Curtis, that petitioners did not comply with the appraisal provisions of the PCL in that the objection was made by the beneficial owner rather than the registered owner. However, it found that such noncompliance resulted from Curtis' violation of the proxy rules under the Act, and awarded Gruss damages of $188,400 together with interest and certain costs (A267-268, 262, 284). The identical amount would have been awarded if the court had found in favor of Gruss on the State Claim (A271).

The Court of Appeals reversed the District Court, holding that Gruss "failed to show that he was in fact deprived of the appraisal rights accorded by the Pennsylvania Business Corporation Law," despite the "hypertechnical" stand taken by Curtis (534 F.2d at 1401), and predicted that a Pennsylvania Court would have sustained Gruss' rights to an appraisal (534 F.2d at 1402). Accordingly, it rejected the Federal Claim, one of the two mutually exclusive grounds for relief alleged by the petitioners. However,

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* "A" Refers to the Appendix on Appeal in the Second Circuit.

even though its rejection of the Federal Claim was based upon its stated belief that Gruss had not lost his appraisal rights, the Court of Appeals did not grant relief based upon the State Claim, i.e., that Curtis wrongfully refused to recognize those appraisal rights. Instead, it dismissed the complaint entirely.

The only comment made by the Court of Appeals with respect to its failure to grant relief on the State Claim was, as follows:

> "Without discussion the judge [in the District Court] found Curtis was entitled to judgment on the pendent claim—doubtless a correct conclusion since Mr. Gruss' right to an appraisal apparently had become time barred" (534 F.2d at 1401).

However, the District Court *did* discuss its reasons for holding that "Curtis was entitled to judgment on the pendent claim." With respect to such claim, the District Court explicitly stated that Gruss failed to comply with the Pennsylvania statute "because the objection was not executed by the holder of record" (A285). In view of the Court of Appeals' finding that Gruss' appraisal rights were indeed violated, its dismissal of the State Claim cannot be explained by looking to the reason for the District Court's dismissal of that claim.

The comment by the Court of Appeals that Gruss' appraisal rights "apparently had become time barred," could not have been the basis for its dismissal of the State Claim. A word like "apparently" cannot be the basis of a holding. Furthermore, if it had intended to base its dismissal of the State Claim on the existence of a time bar it would have

explained its reasons, citing legal authority and referring to the facts in the record. It did not do this even though neither the parties nor the court below had raised, dealt with or even mentioned any time bar question. Indeed, the appraisal rights had not been time barred and nothing in the record supports the Court of Appeals' surmise that they had.

No such time bar could possibly have been the basis for the decision. Although the appraisal statute contains certain time limitations, at the trial the parties had stipulated, and Curtis had conceded, that there was no issue as to petitioners' compliance with the appraisal statute, except whether the initial objection to the plan was defective because it was made by the beneficial owner* (A98-104).

In short, the Court of Appeals gave no explanation for not granting judgment in favor of Gruss on the State Claim. Instead, it expressed its irritation at Gruss for "rushing into the Federal Court [when he] could have invoked the aid of a Pennsylvania court" (534 F.2d at 1402) and simply turned its back on the State Claim despite the fact that such a claim had been properly asserted by reason of diversity and pendent jurisdiction.

In addition to rejecting the Federal Claim on the ground that Gruss was not deprived of his appraisal rights, the Court of Appeals held that the proxy material was not

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* Curtis also contended at the trial that petitioners submitted a proxy in favor of the recapitalization and thereby waived their appraisal rights. However, the District Court found that a subsequent proxy was submitted by petitioners, against the recapitalization, which revoked the prior proxy. This contention by Curtis was not pressed upon the appeal to the Court of Appeals, and has no relevance upon the stipulation of the parties as it applies to any time limitation.

false and misleading because "[t]he most common rule is that objections giving rise to appraisal rights must be made by stockholders of record, just as voting rights can only be exercised by such holders" (534 F.2d at 1402) and that, the failure of Curtis to explain that "holders of shares" meant only registered holders did not constitute "the standard of culpability we have held applicable as a minimum in damage suits for violations of the Proxy Rules" (534 F.2d at 1403). The Court took the position that recipients of proxy material were sufficiently sophisticated to know that the term "shareholders" meant shareholders of record. In so holding, it ignored the obvious reality that beneficial shareholders (to whom proxy material is distributed under the proxy rules*) consider themselves, as the owners and "shareholders" of the stock involved. It also ignored Curtis' further misrepresentation that all pertinent statutory material was annexed to the proxy statement when in fact the restrictive statutory definition of "shareholder" (relied upon by Curtis in rejecting plaintiffs' appraisal rights) was not annexed.

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* See SEC Regulation 240.14a-7(b)(1).

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court of Appeals authorizes federal courts to refuse to exercise diversity jurisdiction for no reason other than that they do not agree with the plaintiffs' choice of a federal forum over a state forum, a gross departure from the accepted, usual and proper course of judicial proceedings.

In *Meredith* v. *City of Winterhaven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. ed. 9 (1943), this Court set forth the principle that federal courts may not refuse to exercise diversity jurisdiction in cases such as this. The Court stated:

> "The diversity jurisdiction was not conferred for the benefit of the Federal courts *or to serve their convenience.* Its purpose was generally to afford suitors an opportunity in such cases, *at their option,* to assert their rights in the Federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, *it has from the first been deemed to be the duty of the Federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.*" 320 U.S. at 234. (Emphasis added.)

This Court then concluded that there were no valid reasons for the Federal court abstaining from exercising its diversity jurisdiction in that case, with language that is completely apropos to the instant action. The Court stated:

> "Decision here does not require the Federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. *We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justified courts in declining to exercise the jurisdiction which they possess*" (320 U.S. at 237). (Emphasis added.)

In the instant action, the Court of Appeals has given no reason for its refusal to grant judgment to petitioners for Curtis' violation of their appraisal rights, under the Pennsylvania statute, in view of the Court's finding that such appraisal rights had indeed been violated. Its rejection of the Federal Claim on the ground that Gruss had not lost his appraisal rights, while failing to award judgment on the State Claim for the violation of those rights, can only be explained as an abstention by the Court of Appeals from exercising its diversity jurisdiction.*

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* Although Gruss did not take an appeal from the District Court's decision to the extent that it held that he lost his rights of appraisal, the Court of Appeals did not and could not have based its refusal to enforce those rights upon the lack of such appeal. This Court has clearly established that a federal claim and a state claim pendent thereto are, for the purposes of determining the scope of an appeal, merely two theories for recovery on but a single loss which must both be reviewed on an appeal by either party. *Anderson* v. *Atherton,* 302 U.S. 643, 58 S. Ct. 53, 82 L. ed. 500 (1937). Thus, consideration of Gruss' state claim was within the scope of the appeal. Moreover, Gruss was not an aggrieved party for purposes of taking an appeal. Since his state

It is obvious, from its accusation that Gruss came "rushing into federal court" when he "could have invoked the aid of a Pennsylvania court . . ." (534 F.2d at 1402), that the Court of Appeals disliked the fact that petitioners had brought the action in federal court. However, as stated in the *Winterhaven* case, diversity was not conferred "for the benefit of the federal courts or to serve their convenience," but to provide plaintiffs an opportunity "at *their* option" to assert rights in a federal forum. Exceptional and compelling circumstances must support an abstention from exercising diversity jurisdiction, none of which have even been hinted at as being present here. In fact, the exact opposite is true. The federal courts have exclusive jurisdiction over the Federal Claim. Therefore, it was only in the federal courts that petitioners could have asserted both the Federal and State Claims.

By dismissing the diversity claim merely because it felt the petitioners could have chosen the state forum, the Court of Appeals has established a dangerous precedent which is grossly at variance with established law. If allowed to stand, the decision will create a risk for every litigant who chooses the federal forum over a state forum, relying upon diversity jurisdiction. His state claim could be dismissed, perhaps after a trial (as in this case), simply because the court preferred that he assert his claim in a state court. Such a result would completely pervert the access to federal courts intended by Congress in diversity cases. This would cause a fundamental change in the workings of the federal court system, which should not take place without review by the Supreme Court.

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and federal claims were mutually exclusive, and he could not possibly have obtained a judgment on both, he asked for *and received*, from the District Court, judgment based on either one or the other and, therefore, had no adverse decision to appeal from.

POINT II

The Court of Appeals' decision jeopardizes the ability of dissenting shareholders to exercise their appraisal rights, in contravention of the policy and purpose of the Federal Securities Law. The effective exercise of such rights may depend upon whether the state courts have acted to protect those rights.

The right of a dissenting shareholder is often the only protection he has in the event of mergers or other significant corporate actions which change the nature of his investment. Were it not for such right, a shareholder's investment would often be at the mercy of corporate insiders. Because of this, the Securities and Exchange Commission, which was entrusted by Congress with making rules for the protection of investors (Section 14(a) of the Act), promulgated SEC regulation 240.14(a), Schedule 14A, item 2 requiring an issuer to describe in proxy material the procedure required to be followed by a shareholder, under the applicable state law, in order to exercise appraisal rights. This was particularly important in view of the fact that strict compliance with state appraisal statutes is required to enable such rights to be asserted. Indeed, it was to prevent a shareholder from falling into the "trap for the unwary," referred to by the District Court (Appendix B, page 2), that such proxy rules were promulgated.

In holding that the proxy material in the instant action was not misleading because the term "holders of shares" means *registered* shareholders, the Court of Appeals has jeopardized the ability of dissenting shareholders to exer-

cise their rights. When investors place their stock in street name they consider themselves shareholders, usually giving no consideration to the technicality that they are beneficial and not record holders. The federal proxy rules envisage that beneficial shareholders will receive proxy material (SEC Reg. 240.14a-7(b)(1)). Unless the proxy material specifically describes that, under applicable state law, dissenting rights must be exercised through the registered holder, beneficial holders may very well attempt to exercise such rights in their own names. In doing so, they could lose their appraisal rights. The decision of the Court of Appeals permits such a result, in direct contravention of both the language and policy behind the federal securities laws.

Ironically, the highest court of the State of Delaware has acted to protect investors in this situation. In *Raab* v. *Villager Industries,* 355 A. 2d 888 (Del. Sup. Ct. 1976), beneficial shareholders, rather than record shareholders, had objected to a merger because, contrary to the standard set forth by the Court of Appeals, they did not realize that the term "stockholder" meant stockholder of record. The Court recognized the ambiguity of the term "stockholder" and decreed that henceforth the term would have to be specifically explained, stating:

> "A Delaware corporation, engaged in [appraisal] proceedings, henceforth shall have an obligation to issue specific instructions to its stockholders as to the correct manner of executing and filing a valid objection or demand for payment under the statute, as construed by the Delaware Courts, including (1) the general rule that all such papers should be executed by

> the stockholder of record, fully and correctly as named in the notice to the stockholder. . . .
>
> "Fairness to stockholders requires such reasonably specific instructions in [appraisal] proceedings."

As a result of the foregoing, if the decision of the Court of Appeals is permitted to stand, the ability of a beneficial shareholder to exercise his appraisal rights will depend upon the fortuity of whether the issuer happens to be incorporated in a state, such as Delaware, where the state court requires the meaningful disclosure rejected by the Court of Appeals. This will result in non-uniformity in an area where Congress requires uniformity. It is respectfully submitted that such a decision should not stand without being reviewed by this Court.

POINT III

The decision of the Court of Appeals is grossly erroneous and has created a manifest injustice which this Court should not permit to stand.

The District Court found that, by failing to explain that objections had to be sent by registered shareholders, Curtis had created a "trap for the unwary" and that Gruss had been damaged in excess of $188,000. The Court of Appeals also found that Curtis was the wrongdoer. It stated that Curtis' stand in rejecting plaintiffs' demand for appraisal was "hypertechnical" (534 F.2d at 1401), and that its failure to honor Gruss' appraisal rights was wrongful. Yet, despite the fact that *both lower courts found for Gruss, in this respect,* the result of the Court of Appeals erroneous decision is that Gruss will not recover the significant dam-

ages resulting from Curtis' wrongdoing. This is a gross miscarriage of justice. To prevent such miscarriage, the intervention of this Court is required.

CONCLUSION

For the reasons set forth above, petitioners pray that a writ of *certiorari* be issued to review the judgment of the Court of Appeals for the Second Circuit.

Dated: August 18, 1976

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals, Second Circuit

Oscar GRUSS, Plaintiff-Appellee,

and

Oscar Gruss & Son, Plaintiff,

v.

The CURTIS PUBLISHING COMPANY, Defendant-Appellant.

No. 594, Docket 75-7546.

United States Court of Appeals, Second Circuit.

Argued March 11, 1976.

Decided April 21, 1976.

The registered owner and beneficial owner of minority shares brought action against the corporation, claiming loss of appraisal rights under Pennsylvania law as a result of a proxy statement which allegedly failed to give adequate information as to the method of obtaining an appraisal incident to a plan of recapitalization. A judgment of the District Court for the Southern District of New York, Charles L. Brieant, Jr., J., denied a motion to dismiss, 361 F.Supp. 58, and awarded damages. The corporation appealed. The Court of Appeals, Friendly, Circuit Judge, held that Plaintiff, having not attempted to enforce his appraisal rights under Pennsylvania law in the courts of Pennsylvania, failed to show a cause of action under the Securities and Exchange Act and schedule for use of an allegedly false and misleading proxy. Alternatively, the Court held that the corporation's failure to include, in proxy materials, the Pennsylvania business corporation law definition of "shareholder" as registered owner was not negligence violative of proxy rules.

Judgment reversed with instructions to dismiss complaint.

1. Corporations ⇐576

Pennsylvania statute concerning rights of dissenting shareholders does not allow resort to courts only when company has made offer which objector has rejected; statutory language "A dissenting shareholder who is unable to agree with the corporation on the fair value of the shares" is broad enough to include a shareholder who is "unable to agree" because corporation has offered nothing. 15 P.S.Pa. §§ 1515, 1515, subds. B, D-F, H, 1810.

2. Securities Regulation ⇐106

Plaintiff who had not attempted to enforce his appraisal rights as dissenting shareholder under Pennsylvania law in courts of Pennsylvania failed to show cause of action under Securities and Exchange Act and schedule for alleged loss due to use of allegedly false and misleading proxy. 15 P.S.Pa. §§ 1002(18), 1515; Securities Exchange Act of 1934, §§ 14, 14(a), 15 U.S.C.A. §§ 78n, 78n(a).

3. Corporations ⇐576

Most common rule is that objections giving rise to appraisal rights of stockholders must be made by stockholders of record, just as voting rights can only be exercised by such holders. 15 P.S.Pa. §§ 1515, 1810.

4. Securities Regulation ⇐50

Where beneficial owner of minority stock registered in name of established and sophisticated securities firm was himself head of such firm, corporation could reasonably assume that holder of record, whose duty it was to pass proxy solicitation on to beneficial owner, would take precautions to see that any objection was properly made, and corporation's failure to include in proxy materials, Pennsylvania business corporation law definition of "shareholder" as registered owner was not negligence violative of proxy rules. 15 P.S.Pa. §§ 1002(18), 1515, 1515, subds. F, H; Securities Exchange Act of 1934, §§ 10(b), 14, 14(a), 15 U.S.C.A. §§ 78j(b), 78n, 78n(a).

5. Securities Regulation ⇐106

In action for alleged loss allegedly resulting from false or misleading proxies,

absence of any custom or practice by lawyers in general or Pennsylvania lawyers in particular to caution minority stockholders expressly that, in order to qualify for appraisal rights, objections must be made by holder of record was not conclusive in defendant's favor, but was entitled to weight. 15 P.S.Pa. §§ 1002(18), 1515; Securities Exchange Act of 1934, §§ 14, 14(a), 15 U.S.C.A. §§ 78n, 78n(a).

6. Securities Regulation ⇐143

In action for alleged loss allegedly resulting from false and misleading proxies, it was minority shareholder's burden to show negligence on part of company in notifying him of appraisal rights, not burden of defendant to negate such negligence. 15 P.S.Pa. §§ 1002(18), 1515; Securities Exchange Act of 1934, §§ 14, 14(a), 15 U.S.C.A. §§ 78n, 78n(a).

Theodore L. Marks, New York City (Lee, Cash & Marks, New York City, of counsel), for defendant-appellant.

Michael P. Fuchs, New York City (Kass, Goodkind, Wechsler & Gerstein, New York City, of counsel), for plaintiff-appellee.

Before FRIENDLY, MULLIGAN and GURFEIN, Circuit Judges.

FRIENDLY, Circuit Judge:

This action, in the District Court for the Southern District of New York, arises from a plan of recapitalization adopted by defendant The Curtis Publishing Company (Curtis), a Pennsylvania corporation, at an annual meeting of shareholders on September 14, 1972. Curtis' capitalization had consisted of $7,485,000 of Subordinated 6% Income Debentures due October 1, 1986, bearing $2,470,000 of accrued interest; 334,470 shares of $4 Prior Preferred Stock on which $10,034,100 of cumulative dividends were unpaid as of May 1, 1972; 239,418 shares of $1.60 Prior Preferred Stock on which $1,436,508 of cumulative dividends were also unpaid; and 3,555,568 of Common Stock. The objective of the plan was to exchange a new Common Stock for the two series of Prior Preferred Stock and so many of the Income Debentures as consented, thereby eliminating the preferred stocks with the large arrearages of dividends and part of the Debentures and leaving Curtis with a simple capital structure of the unexchanged Debentures and Common Stock. The exchange ratios were 9.84 shares of new Common Stock for each $100 of Debentures, 1.54 shares for each share of $4 Dividend Prior Preferred Stock, 0.93 shares for each share of $1.60 Dividend Prior Preferred Stock, and 0.10 shares for each share of existing common stock. These ratios were determined by giving the Debentures and the two issues of Prior Preferred Stock five times their average market value in terms of the average market value of the old common stock, giving the old common stock its average market value, and then dividing all the ratios by 10 to avoid issuance of an undue number of shares of new common stock.

The Proxy Statement for the annual meeting contained the following:

APPRAISAL RIGHTS

The Business Corporation Law of Pennsylvania sets forth certain rights and remedies applicable to holders of shares of Prior Preferred Stock of Curtis who may object to and desire to dissent from the cancellation of their right to receive dividends which have accrued but have not been declared. The following brief summary of such rights and remedies does not purport to be complete and is qualified in its entirety by reference to Sections 810 and 515 of such law, a copy of which appears in Exhibit C hereto. Under such provisions, a holder of Prior Preferred Stock of Curtis who wishes to demand payment of the fair value of his shares must file with Curtis, prior to the

commencement of voting by shareholders upon the Amended and Restated Articles of Incorporation, a written objection thereto and must not vote in favor of this proposal. Voting against the proposal or giving a proxy to vote against it will not constitute such a written objection. In addition, such shareholder must, within 20 days after the date on which the vote on this proposal was taken, make written demand on Curtis for payment of the fair value of his shares, stating the number and class and series, if any, of the shares owned by him with respect to which he dissents. Within 20 days after such demand, such shareholder must submit his certificate or certificates to Curtis for notation that such demand has been made. Within 30 days after the Amended and Restated Articles of Incorporation become effective, Curtis will give written notice thereof to dissenting shareholders who have complied with the foregoing requirements and will make a written offer to each such shareholder to pay a specified price as the fair value of his shares. If, at any time after 60 days and within 90 days after the Amended and Restated Articles of Incorporation become effective, the fair value is not agreed upon between Curtis and a dissenting shareholder, the shareholder may demand court proceedings to value his shares. The costs and expenses of any such proceedings will be assessed against Curtis but may be fully or partly apportioned and assessed against any or all of the dissenting shareholders who are parties to the proceedings if the court shall find that the action of such shareholders in failing to accept Curtis' offer to pay for the shares was arbitrary, vexatious or not in good faith.

The statute provides that unless a shareholder of Curtis files a written objection and makes the necessary demand within the 20-day period described above, he shall be conclusively presumed to have consented to the Amended and Restated Articles of Incorporation and shall be bound by the terms thereof.

The foregoing relates only to holders of Prior Preferred Stock of Curtis. The holders of Common Stock of Curtis will have no appraisal rights.

Copies of §§ 810 and 515 of the Pennsylvania Business Corporation Law were attached as Exhibit C; we quote in the margin § 515B, D, E, F and H.[1] Exhibit C did

1. B. If any shareholder of a business corporation shall file with such corporation, prior to the commencement of the voting by shareholders upon the plan at the meeting of shareholders at which a plan is submitted to a vote, a written objection to such plan, and shall not vote in favor thereof, and such shareholder, within twenty days after the date on which the vote approving the plan was taken, shall also make written demand on the corporation, or the surviving or new corporation resulting from the plan, for the payment of the fair value of his shares, such corporation shall pay to such shareholder the fair value of his shares as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan upon surrender of the share certificate or certificates representing his shares. Neither a proxy nor a vote against the plan shall constitute such a written objection. The demand of the shareholders shall state the number and class and series, if any, of the shares owned by him with respect to which he dissents. A dissenting shareholder may dissent as to all or less than all of those shares registered in his name of which he is not the beneficial owner, but there may not be dissent with respect to some but less than all shares of the same class or series owned by any given beneficial owner of shares whether or not the shares so owned by him are registered in his name. Unless a shareholder files such written objection and also makes such demand within the twenty-day period, he shall be conclusively presumed to have consented to the plan, and shall be bound by the terms thereof. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder as to the shares with respect to which he dissents.

not include a subsection, § 2(18), of the general definitions section in the Pennsylvania Business Corporation Law which states:

"Shareholder" means a registered owner of shares in a business corporation.

Plaintiff Oscar Gruss, an experienced stock-broker, is a general partner of Oscar Gruss & Son, which is a member of the New York and American Stock Exchanges and the National Association of Securities Dealers. At the time of Curtis' 1972 meeting he was the beneficial owner of 12,560 shares of

D. Within thirty days after such plan became effective, the corporation or in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided, and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. Such notice and offer shall be accompanied by a balance sheet of the corporation as of the latest available date and not more than twelve months prior to the making of such offer and a profit and loss statement of such corporation for the twelve months' period ended on the date of such balance sheet.

E. If within sixty days after the date on which such plan became effective, the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such plan became effective, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares.

F. A dissenting shareholder who is unable to agree with the corporation on the fair value of his shares may demand proceedings to value his shares at any time after sixty days and within ninety days after the date on which the plan became effective. Within thirty days after receipt of any such written demand, the corporation shall, or at its election at any time after sixty days and within ninety days after the effective date the corporation may, file a petition in the court of common pleas in the county in this State where the registered office of the corporation is located, praying that the fair value of such shares be found and determined. If in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this State, such petition shall be filed in the county where the registered office of the domestic corporation was last located, which county shall be deemed to be the county where the cause of action arose and all process shall be served upon such foreign corporation as provided in section 1011 of this act. If the corporation has not instituted the proceeding as herein provided, any dissenting shareholder may do so in the name of the corporation at any time within thirty days after the expiration of such ninety day period. All dissenting shareholders wherever residing shall be made by the corporation parties to the proceeding as an action against their shares quasi in rem. A copy of the petition shall be served on each dissenting shareholder who is a resident of this State and shall be served personally or by registered or certified mail on each dissenting shareholder who is a nonresident. The jurisdiction of the court shall be plenary and exclusive. All shareholders who are parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or an amendment thereof. The judgment shall be payable only upon and concurrently with the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares.

H. The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares if the court shall find that the action of such shareholders in failing to accept such offer was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for and reasonable expenses of the appraisers but shall exclude the fees and expenses of counsel for and experts employed by any party, but if the fair value of the shares as determined materially exceeds the amount which the corporation of-

the $4 Prior Preferred Stock, which were registered in the name of Oscar Gruss & Son. On receipt of the proxy material Oscar Gruss & Son initially returned an affirmative proxy for these shares.[2] However, Mr. Gruss directed Julius Anreder, a securities analyst employed by the firm, to study the plan. Anreder concluded it would be advisable for Mr. Gruss to exercise dissenters' rights. He prepared a letter, dated September 12, 1972, to Mr. SerVaas, the chief officer of Curtis. The letter on the letterhead of Oscar Gruss & Son but signed by Mr. Gruss,[3] is set forth in the margin.[4] Enclosed with it was a negative proxy which, of course, revoked its predecessor. Apparently the proxy found its way into the hands of Curtis' general counsel, the respected Philadelphia firm of Morgan, Lewis & Bockius, but was not voted. The failure to vote this and the use of the prior affirmative proxy, which is unexplained, had no effect on the approval of the plan by the holders of more than the required two-thirds of the two classes of preferred stock, nor of course, on the required affirmative majority of common stock holders.

On September 21, 1972, Mr. Gruss wrote Mr. SerVaas, again on the letterhead of Oscar Gruss & Son, making a demand for payment of the fair value of his $4 Prior Preferred shares. At the same time Oscar Gruss & Son sent a letter enclosing the certificates for Mr. Gruss' shares for notation of the demand thereon. On the advice of counsel Curtis rejected Mr. Gruss' demand because the exercise of dissenters' rights had been incorrectly initiated by the objection of Gruss as the beneficial owner rather than by the partnership, Gruss and Son, as record owner. Mr. Gruss did not pursue the matter further in Pennsylvania; instead, on January 17, 1973, he filed the complaint in this action in the District Court for the Southern District of New York.

The first count of the complaint alleged that the proxy materials were false and misleading in violation of § 14(a) of the

fered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

2. Actually this proxy did not affirmatively designate a vote one way or the other; the proxy instructions provided, however, that if no explicit choice were indicated on the returned proxies, they would be voted in favor of the plan for recapitalization.

3. Inspection of another signature, virtually identical to the one on the September 12 letter, but occurring on a September 21 letter over the typed name "Oscar Gruss & Son," suggests that a typist's error and not a mis-signing may be responsible for the entire contretemps. Neither signature is so clear, however, that we can say which—"Oscar Gruss" or "Oscar Gruss & Son"—is the proper reading.

4. OSCAR GRUSS & SON
MEMBERS NEW YORK STOCK EXCHANGE
80 PINE STREET, NEW YORK, N. Y. 10005
September 12, 1972

Mr. Beurt R. SerVaas, Chair of the Board
The Curtis Publishing Company
1701 The Fidelity Building
Philadelphia, Pennsylvania 19109

Dear Mr. SerVaas:

Enclosed please find my proxy for 12,560 shares of Curtis Publishing $4.00 Dividend Series Prior Preferred Stock series registered in the name of Oscar Gruss & Son, of which I am beneficial owner.

As you will note I am voting against proposal No. 3 (three) proposing the adoption of the plan of reorganization outlined in the proxy material dated July 27, 1972 which was sent to me.

In addition, pursuant to Sections 810 and 515, of the Business Corporation Law of Pennsylvania, I hereby object to this proposal since it makes inadequate provision for the rights and preferences of my preferred stock.

It is my intention to demand payment of the fair value of my shares within 20 days after the meeting date if it is approved by the shareholders.

Very truly yours,
/s/ OSCAR GRUSS
OSCAR GRUSS

OG:pm
Enc.

Securities Exchange Act and Item 2 of Schedule 14A,[5] in that they failed to define the words "holders of shares" and to state that the term "shareholder" was defined by § 2(18) of the Business Corporation Law of Pennsylvania to mean a "registered owner of shares" rather than an actual or beneficial owner.[6] The second count set forth a pendent claim that plaintiff was in fact entitled to an appraisal under Pennsylvania law. Plaintiff's interest lay in the first count.

The district court held that the Proxy Statement was false and misleading since the failure to define the term holder "created a typical 'trap for the unwary.'" Plaintiff was thus entitled to receive the equivalent of the appraisal rights which the court thought he had lost by failing to see to it that all communications were in the name of Oscar Gruss & Son, rather than Oscar Gruss. The court found the value of the $4 Prior Preferred Stock to be $15 per share[7] and accordingly awarded judgment for $188,400 plus a $1,500 appraisal fee and pre-judgment interest. Without discussion the judge found Curtis was entitled to judgment on the pendent claim—doubtless a correct conclusion since Mr. Gruss' right to an appraisal apparently had become time-barred. Defendant has appealed from the judgment against it. We reverse and direct dismissal of the complaint.

[1, 2] Our first ground for reversal is that plaintiff failed to show that he was in fact deprived of the appraisal rights accorded by the Pennsylvania Business Corporation Law. The hypertechnical stand taken by Curtis in rejecting plaintiff's demand did not end the matter. Plaintiff's situation was not at all like a case where all communications had come from a name not appearing on the stock records and nothing had occurred that would apprise the company that objection was being voiced by the registered owner. Here the letter of objection itself, on the firm's letterhead, disclosed that the 12,560 shares were registered in the name of Oscar Gruss & Son, and the signature could well be construed as including action by Mr. Gruss as a member of the partnership that bore his name. This sufficed to meet the statutory objective of advising Curtis that if it proceeded with the recapitalization plan it should reckon with the probability of an appraisal demand for these shares. Similarly, both September 21 letters were on the Oscar Gruss & Son letterhead, each referred to the other, and Oscar Gruss' letter making demand promised delivery of shares by the record holder. The receipt of those shares

5. This requires that, in a case like the present, a proxy statement shall "Outline briefly the rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights."

6. We omit allegations in the first count, which were also the basis for a third count subsequently dismissed, that the proxy materials were false and misleading because they referred to sections of the Business Corporation Law by the numbers contained in the statute as enacted by the Pennsylvania legislature rather than with a preceding 1 (e. g., § 1515 rather than § 515) as they appear in Purdon's Pennsylvania Statutes Annotated. This is like saying that it would be a violation of the Securities Exchange Act to refer to "§ 14" of that Act rather than to "15 U.S.C. § 78n."

7. This compared with a June, 1972 market high of 4¾ before the plan had been announced; in August, after the proxy material had been circulated, the stock fell to 2⅛. In 1971 the high was 9, in the first quarter; the low for that quarter was 5. The judge's calculation was based on there being a 25% chance that, without the recapitalization plan, Curtis could survive until 1986 and then be able to pay off the Debentures with $8,981,000 accrued interest, at which time it would also pay the accumulated dividends on the Prior Preferred stock. Apart from other difficulties such as the derivation of the 25% probability, we do not understand on what basis Mr. SerVaas, whose services were considered to be an important plus for Curtis and whose interests lay primarily in the common stock, could reasonably be expected to labor, Sisyphus-like for 17 years for the benefit of the holders of Debentures and Prior Preferred stock. However, in view of our conclusions on the merits we are not required to go into these matters.

surely dispelled any reasonable doubt as to the authority for objection. Although the leading Pennsylvania cases on the subject, *Era Co., Limited v. Pittsburgh Consolidation Coal Co.*, 355 Pa. 219, 49 A.2d 342 (1946); *Martin v. Pittsburgh Consolidation Coal Co.*, 355 Pa. 223, 49 A.2d 344 (1946); *In re Kreher*, 379 Pa. 313, 108 A.2d 708 (1954), firmly enforce the principle that a company is entitled to have its attention called to names identifiable on its records, none of these approaches the extent of technicality that would have been necessary to sustain the position taken by Curtis here. Indeed Mr. Gruss' case is not essentially different from that of the holders of the 900 shares in *Kreher* in whose behalf an objection was entered by an attorney, also not the holder of record, and whose appraisal rights were vindicated. Rather than deciding his case under Pennsylvania law against himself and rushing into the federal court in New York, Mr. Gruss could have invoked the aid of a Pennsylvania court;[8] our prediction is that it would have sustained his right to an appraisal—if, indeed, Curtis had persisted in its obduracy, which may be doubtful since it was confronted with admittedly valid demands by other shareholders.

[3, 4] Alternatively we hold that plaintiff failed to show that the proxy statement was false and misleading.[9] The most common rule[10] is that objections giving rise to appraisal rights must be made by stockholders of record, just as voting rights can only be exercised by such holders.[11] Determination of the persons entitled to vote is one of the functions performed by setting a record date, and the Notice of Annual Meeting stated that the board of directors had fixed July 27, 1972 "as the record date for the determination of holders of Prior Preferred Stock and Common Stock entitled to notice of and to vote at the meeting." The reference to "holders of shares" and "shareholder[s]" in the section of the proxy statement entitled "Appraisal Rights" which we have quoted must be read in this light. Mr. Gruss must have known that he was receiv-

8. Counsel's endeavor to explain the failure to seek relief in Pennsylvania on the basis that § 515 allows resort to the courts only when a company has made an offer which the objector has rejected is wholly unpersuasive. Counsel cites no Pennsylvania authority for so perverse a reading of the statute, and we find no basis for one in the language. The reference in § 515F to "A dissenting shareholder who is unable to agree with the corporation on the fair value of his shares" is broad enough to include a shareholder who is "unable to agree" because the corporation has offered nothing. Beyond this § 515H explicitly includes the case where "no offer is made." See note 1, *supra*.

9. In so holding we do not at all accept Curtis' argument that civil liability for a false or misleading proxy statement exists only where the defect concerns the investment decision rather than the method for exercising dissenters' rights. If, for example, a proxy statement overstated the period in which objection must be made, a plaintiff relied upon this, and state law would not hold the company to be estopped, we have little doubt that civil liability under § 14(a) would exist.

10. Many states limit the right to demand payment to stockholders of record see e. g., *Salt Dome Oil Corp. v. Schenck*, 28 Del.Ch. 433, 41 A.2d 583 (1945); *Goodisson v. North American Securities Co.*, 40 Ohio App. 85, 178 N.E. 29 (1931); *Brown v. Hedahl's Q.B.&R., Inc.*, (North Dakota), 185 N.W.2d 249 (1971); but this rule is by no means without exception, see *Applications of Friedman*, 184 Misc. 639, 54 N.Y.S.2d 45 (Sup.Ct.), *modified*, 269 App.Div. 834, 56 N.Y.S.2d 516 (1st Dept. 1945), and at least one jurisdiction has held both beneficial owners *and* holders of record to be entitled to exercise dissenters' rights, compare *Bache & Co. v. General Instrument Corp.*, 74 N.J.Super. 92, 180 A.2d 535 (1962), *aff'd* 42 N.J. 44, 198 A.2d 759 (1964), with *Bohrer v. U. S. Lines*, 92 N.J.Super. 592, 224 A.2d 348 (1966).

11. Because of this the rules of the New York Stock Exchange and other exchanges have long required member firms to forward proxy materials received by them as registered owners to the beneficial owners. See, e. g., Rule 451, N.Y.S.E. Constitution and Rules; Rule 576, American Stock Exchange Constitution and Rules. Banks and others acting as custodians for securities follow the same course. An SEC rule, effective December 20, 1974, requires issuers to furnish such record holders sufficient copies of proxy materials to enable them to discharge these duties, see 17 C.F.R. § 240.14a-3(12)d; in practice this had long been done by most issuers.

ing the proxy material through his firm as record holder and should have realized that communications in the other direction should emanate from the same source.

To be sure, in the blinding glare of hindsight one can see that it would have been better if the proxy materials had included the definition in § 2(18) of the Pennsylvania Business Corporation Law. But we cannot sustain the district court's conclusion that failure to do this constituted negligence by Curtis—the standard of culpability we have held applicable as a minimum in damage suits for violations of the Proxy Rules. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1298–1301 (2 Cir. 1973).[12] The relevant portions of the Proxy Statement did not lead in the wrong direction; plaintiff's claim is that they did not lead so far in the right one as to eliminate any possibility of error.

This is too strict a standard, at least for the present case. In the first place, it is hardly clear that Curtis is solely responsible for a failure to inform the beneficial owner of all the requirements for the assertion of appraisal rights, since Curtis could reasonably assume that the holder of record, whose duty it was to pass the proxy solicitation on to the beneficial owner, would take precautions to see that any objection was properly made. Here there was every reason to rely on a high estimation of the competence and reliability of the record holder, an established and sophisticated securities firm; there was little likelihood that proper care would not be used; and since the beneficial owner was himself the head of the securities investment firm, it would appear to have been easy for "the actor himself [to have taken] precautions," see Prosser, Law of Torts, 176–77 (4th Ed.). Even if Curtis had some duty to anticipate and guard against the conduct of erring beneficial owners, this would be measured against a realistic assessment of the capabilities and probable behavior of the parties involved, see Second Restatement of Torts, §§ 290, 302 (1965). We do not have here the case of proxies having been forwarded by an inexperienced country bank to Auntie Mame; surely it is too much to expect that a company should anticipate that the head of a successful investment house would err with respect to his own securities held in the firm name—if err he did.[13]

[5, 6] Moreover, plaintiff offered no evidence of any practice by lawyers in general or Pennsylvania lawyers in particular to caution expressly that, in order to qualify for appraisal rights, objections must be made by the holder of record.[14] Although

12. In its recent decision imposing a standard of culpability higher than negligence for violation of § 10(b) of the Securities Exchange Act and the SEC's Rule 10b 5, the Supreme Court took note of our ruling in *Gamble-Skogmo* that negligence could create liability under § 14(a), without approving or disapproving it. *Ernst & Ernst v. Hochfelder*, ___ U.S. ___, ___, 96 S.Ct. 1375, 1388, 47 L.Ed.2d 668, 685 (1976), 44 U.S.L.W. 4451, 4459, n. 28.

13. We see no force in the repeated references to the fact that, however experienced Mr. Gruss was in proxy matters, Mr. Anreder was not. It was scarcely foreseeable that the head of a stock exchange firm with a proxy department at his disposition would delegate the preparation of a formal notice of objection to a securities analyst. In view of our holding we are not obliged to consider Curtis' contention on the score of contributory negligence by the plaintiff.

14. In support of a motion for a new trial, Curtis submitted, *inter alia*, an affidavit of the partner in Morgan, Lewis & Bockius who supervised the preparation of the Curtis Proxy Statement. This stated that prior to the institution of this action he had "never seen an articulation of appraisal rights under the Business Corporation Law of Pennsylvania, either prepared by Morgan, Lewis & Bockius or by any other Pennsylvania law firms or lawyers, which expressly states that the appraisal rights had to be exercised by the record holder, as opposed to the beneficial owner." We do not fault the judge for denying the new trial motion on the ground that this evidence and material showing that all other objections had been made by record owners, including two New York Stock Exchange firms acting through their proxy departments on behalf of beneficial owners, were not newly discovered. Still it was the plaintiff's burden to show negligence not the defendant's to negate it.

absence of such a custom or practice is not conclusive in a defendant's favor, it is entitled to weight. See the discussion in *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 52–53 (2 Cir. 1976). There likewise was no evidence that the Proxy Statement had proved to be a "trap for the unwary" for anyone but Mr. Gruss—if, indeed, it was as to him—or that similar proxy statements by other Pennsylvania corporations had proved to be so.

The judgment in favor of the plaintiff is reversed with instructions to dismiss the complaint. Mr. Gruss is, of course, entitled to receive the common stock issuable in respect of his $4 Prior Preferred shares under the recapitalization plan.

APPENDIX B

Findings and Conclusions

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR GRUSS and OSCAR GRUSS & SON,

Plaintiffs,

-against-

THE CURTIS PUBLISHING COMPANY,

Defendant.

73 Civ. 282-CLB

#42079

FINDINGS AND CONCLUSIONS

Bryant, J.

By their complaint, filed January 17, 1973, plaintiffs stated a claim based upon claimed violations of §§14(a) and 27 of the Securities Exchange Act of 1934 and certain rules and regulations adopted under that Act, mentioned below. As to that claim, this Court has exclusive subject matter jurisdiction. 15 U.S.C. §78aa.

Plaintiffs also pleaded a second count based upon §§515 and 810 of the Pennsylvania Business Corporation Law concerning appraisal of shares of dissenting owners. As to this second claim, the Court has pendent jurisdiction. A third claim was withdrawn prior to trial. This action was tried before the Court

without a jury on October 10 and 11, 1974, and decision reserved pending receipt of post-trial memoranda which have now been considered.

Certain facts have been stipulated, and need not be repeated here. In addition, familiarity with our memorandum decision dated July 11, 1973 (361 F.Supp. 58) is assumed.

Defendant ("Curtis") is a Pennsylvania corporation with its principal place of business in Indiana, although at all relevant times, Mr. Beurt R. SerVaas, Chairman of the Board and Chief Executive Officer, had his office at Philadelphia, Pennsylvania. Plaintiff Oscar Gruss and Son, a New York partnership, sometimes referred to as Gruss and Son, is a stockbrokerage firm, and a Member of the New York Stock Exchange. Plaintiff Oscar Gruss ("Mr. Gruss") is a general partner thereof.

At all relevant times Gruss and Son was the record holder of more than 12,560 shares of the $4.00 Dividend Series, Preferred Stock of Curtis, and Mr. Gruss was the beneficial owner of that number of shares ("the stock"). Under date of July 27, 1972, Curtis sent a notice of Annual Meeting, and proxy solicitation materials to its shareholders of record, giving notice of a

meeting to be held in Philadelphia on September 14, 1972. Included among the stated purposes of the meeting was a vote upon the adoption of a plan of recapitalization. Among the many details of this plan was a provision for the mandatory conversion of each outstanding share of the aforementioned series of Preferred Stock into 1.54 shares of new common stock without par value. The plan also converted the $1.60 Dividend Series, Prior Preferred Stock into 0.93 shares of new common stock, and effected a one for ten reverse split of the existing $1.00 par value common stock into 0.10 shares of new common stock without par value. As a part of the plan, the company proposed to issue 9.84 shares of its new common for each $100.00 principal amount of 6% subordinate income debentures due 1986. These debentures outstanding in the principal amount of $6,455,000.00 carried approximately $2,470,000.00 in accrued interest as of May 1, 1972. These debentures and the accrued interest would be eliminated as a liability of Curtis, and all accrued but unpaid Preferred Stock dividends were also eliminated.[1/]

The proxy statement at p.49 attempted to summarize the appraisal rights granted to dissenting shareholders by the laws of

Pennsylvania. It provided in relevant part as follows:

"APPRAISAL RIGHTS

The Business Corporation Law of Pennsylvania sets forth certain rights and remedies applicable to holders of shares of Prior Preferred Stock of Curtis who may object to and desire to dissent from the cancellation of their right to receive dividends which have accrued but have not been declared. The following brief summary of such rights and remedies does not purport to be complete and is qualifiedin its entirety by reference to Section 810 and 515 of such law, a copy of which appears in Exhibit C hereto. Under such provisions, a holder of Prior Preferred Stock of Curtis who wishes to demand payment of the fair value of his shares must file with Curtis, prior to the commencement of voting by shareholders upon the Amended and Restated Articles of Incorporation, a written objection thereto and must not vote in favor of this proposal. Voting against the proposal or giving a proxy to vote against it will not constitute such a written objection. In addition, such shareholder must, within 20 days after the date on which the vote on this proposal was taken, make written demand on Curtis for payment of the fair value of his shares, stating the number and class and series, if any, of the shares owned by him with respect to which he dissents. Within 20 days after such demand, such shareholder must submit his certificate or certificates to Curtis for notation that such demand has been made." (Emphasis added.)

At page 92, certain statutory provisions of the Pennsylvania Business Corporation Law providing for dissenters' rights were

set forth. The words of the statute, as copied, read "the holder of any outstanding shares ... who shall object to such amendment and comply with section 515 of this act ...." (Emphasis added.)

Exhibit 1, a letter under date of September 12, 1972, was prepared at Mr. Gruss' direction by Julius Anreder, a securities analyst employed at Gruss and Son. After concluding that it would be desirable for Mr. Gruss to exercise dissenters' rights and demand payment of the fair value of his shares, Anreder, an intelligent person having a reasonable degree of experience in such matters, and having read Curtis' proxy solicitation materials carefully, wrote the letter for Mr. Gruss, who signed it, and sent it registered mail to Mr. SerVaas. In reliance on a fair interpretation of the portion of the proxy statement which relates to dissenters' rights, Anreder, acting for Gruss, concluded that the beneficial owner could exercise the dissenter's rights. He took all reasonable and necessary steps to protect Mr. Gruss' rights in the matter by complying with the first condition precedent of the Pennsylvania statute.

The letter of September 12th, (Exhibit 1), was actually

received by Mrs. Margaret B. Wilkinson, who was the personal secretary to Mr. SerVaas, and was also Vice President and Corporate Secretary of Curtis. Mr. SerVaas was one of the persons designated to act as proxy on Curtis' official proxy form, which contained provisions by which a holder could direct his vote for or against the plan of recapitalization.

The September 12th letter reached Mrs. Wilkinson prior to the shareholders meeting. She remembers receiving it. After this litigation was commenced, the original letter and envelope were found in the files of Curtis' Philadelphia attorneys, unaccompanied by any proxy form.

I find that Mrs. Wilkinson delivered the letter and the original envelope to the Philadelphia attorneys for Curtis. Mrs. Wilkinson is an experienced business executive, holding a responsible job which requires substantial secretarial capabilities. The letter on its face says that a negative proxy is enclosed, and at the bottom left hand corner of the letter the customary legend "Enc." appears. Ordinary business practice would require an experienced executive secretary on receiving such a letter

to observe the absence of the claimed enclosure, if in fact the enclosure was missing. Ordinary business practice also would have required her to write or telephone the sender of the letter to the effect that no enclosure was found as indicated. Undoubtedly in passing such a letter along to Curtis' attorneys she would have placed thereon a notation "received without enclosure." In the absence of any evidence to the contrary, I find, in reliance on the testimony of Anreder, Mr. Gruss and Mrs. Wilkinson, and a presumption of regularity which flows from the ordinary business practices of stockbrokerage firms which regularly issue proxies on shares held in the cage, that the valid negative proxy was in fact enclosed with Exhibit 1, and was in fact received by the Secretary of Curtis prior to the shareholders meeting.

This negative proxy was never voted, as is apparent from the total certified vote of the election. However, plaintiffs, relying, through Anreder, on the proxy statement, had done all they were reasonably required to do under the circumstances, to vote negatively, and to object in compliance with the statute. The failure of the corporate Secretary or the proxies named in the negative proxy form to cause a negative vote to be cast for plaintiffs is unexplained.

On September 21, 1972, again acting with the advice and counsel of his agent and employee, Anreder, Mr. Gruss wrote SerVaas again, making demand on the company for the payment of the fair value of his shares, as a dissenting shareholder. There were forwarded separately at the same time, certificates for shares registered in the name of Gruss and Son (for a total of 10 more shares than those belonging to Mr. Gruss) for notation thereon of plaintiff's demand as to his stock ownership. The partnership sent a separate covering letter to Mr. SerVaas, forwarding the shares.

Curtis rejected plaintiffs' claims because the dissenters rights were sought to be exercised by Mr. Oscar Gruss, the beneficial owner, rather than by Oscar Gruss and Son, his nominee and the owner of record. With respect to proxy solicitation material, a corporation is entitled to deal in all respects with its shareholders of record. See Vol. 2, Loss, Securities Regulation, p.876 and Vol. 5, Fletchers Cyclopedia, Corporations, §2007, 2053. However, corporations issuing proxy statements know that in many cases shares are held of record by broker-dealers, banks, voting trustees, or their nominees, and that it is the custo

and practice of such holders of record to forward proxy solicitation materials to the beneficial owners, and to seek from such clients authority and instructions as to how to vote with respect to controversial matters. Indeed, by 17 C.F.R. 240.14a-3(12)d, which became effective December 20, 1974, and is not retrospective, the Securities and Exchange Commission required issuers to supply record holders "with additional copies [of proxy soliciting material] in such quantities, assembled in such form and at such a place, as a record holder may reasonably request in order to address and send one copy of each to each beneficial owner of securities so held," and to pay the reasonable expenses therefor.

Accordingly, Curtis knew that the proxy statement would fall into the hands of beneficial owners, to be read and relied on by them.

There is conflicting usage of the word "holder" and its variants in the proxy solicitation materials. At some points, references to "holders" of stock intend clearly to mean beneficial holders, see e.g. "Tax Consequences", and "Fractional Shares", p.12. Elsewhere, the unqualified term means holders of record; see pp.9,

10 of Exhibit 2.

The rule established at 17 C.F.R. §240.14a-101, item 2, requires proxy soliciting materials to advise with at least comprehensible clarity "... any statutory procedure required to be followed by dissenting security holders in order to perfect [their] rights." The SEC uses "holder" in its various Regulations in an ambiguous fashion, and interchangeably to denote beneficial and record owners. For example, §240.13d-4 ("a security holder who ... was the beneficial owner of more than 5 percent..."); §240.14a-3 ("Information to be furnished to security holders."); §240.14a-8 ("Proposals of security holders.").

In this respect, the proxy statement was misleading with respect to a material fact, and omitted to state a material fact necessary in order to make the statements therein not false or misleading, all as required by Rules 14(a)-9a, and 101 promulgated under the Securities Exchange Act of 1934.

I find that the omitted fact, namely that the statutory procedure was available only to the shareholder of record as distinguished from the beneficial owner or holder, was "material in the sense that a reasonable investor might have considered [the

fact] important in making his investment decisions." Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381 (2d Cir. 1974). See also Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 374 (2d Cir. 1973).

These proxy solicitation materials gave incomplete information, and created a typical "trap for the unwary." Mr. Gruss, and his agent Anreder relied on the misleading information, and as a result, Curtis, issuer of the proxy statement which the Court finds misleading, was placed in a position where it could and did refuse to recognize Gruss' timely assertion of the right of appraisal simply because the objection had not been made by the "holder of record", and was therefore not in compliance with the applicable provisions of state law.

It would have been entirely practicable, and relatively simple for Curtis to have advised in the proxy statement that the appraisal rights could be exercised only by a shareholder of record. Also, in this case, it would have been relatively simple for Anreder and Mr. Gruss, had they known of the importance, to have made certain that the exercise of the dissenters' right was signed by the record owner. The record owner was controlled by Mr. Gruss,

in the sense that as a general partner he could have executed any document in behalf of the partnership record owner, and thereby could have exercised the appraisal rights granted by the Pennsylvania statute. It was, in effect, his alter ego. He himself could have signed its name, and would have, had he known of the trap.

The Prior Proxy

On August 22, 1972, a proxy form bearing a rubber stamp of the sort used at the office of Oscar Gruss and Son was signed with the firm signature and sent to or collected by Curtis. This proxy did not designate a vote as to any of the four matters listed thereon, but did provide that if no instructions were specified, the proxies would vote in favor of the plan of recapitalization, and therefore this must be considered an affirmative vote. Plaintiffs deny execution of or validity of the proxy.

I am satisfied upon all the evidence before me that it was in fact executed at the office of Oscar Gruss and Son at 80 Pine Street in New York City, and was in fact received by Curtis in the regular course of business and used by SerVaas and the other two persons thereon named, to vote for the plan at the meeting

on September 14th. I infer that the proxy was regularly issued, and that the persons issuing it had at least apparent authority. So that as it may, SerVaas, to whom the authority of the proxy was granted, by whomever signed it on August 22nd, had knowledge of all the relevant facts concerning these shares of stock and the desire of its owner to vote negatively. He was placed on actual and constructive notice, as was Curtis, by the receipt by Mrs. Wilkinson of Exhibit 1, addressed to SerVaas and sent by registered mail, which arrived prior to the meeting.

It is generally accepted that the proxy issued latest in time revokes prior proxies. Although we find no clear authority in Pennsylvania law, general principles of the law of agency and the requirements of equitable dealings between principal and agent are such as to require Curtis, and its management proxies, SerVaas, et al, to be deemed placed upon notice of the infirmity of the prior proxy, and the desire of their principal to vote negatively. A person designated as a proxy is an agent for the person whose vote he casts, and must deal with his principal in accordance with requirements of loyalty and good faith. While a person voting for the reorganization would be estopped from claiming dissenters'

rights, I find that under all the surrounding circumstances, plaintiffs' shares should not have been voted for the plan, and that the affirmative proxy, Exhibit A, was validly revoked prior to the convening of the shareholders meeting.[2/] Accordingly, the affirmative defense pleaded in this action lacks merit.

Measure of Damages

The measure of damages is compensatory. Plaintiffs are entitled to be placed in the same position they would have enjoyed had they received correct information in the proxy statement, voted against the plan, and pursued their dissenting shareholders' rights of appraisal under the Pennsylvania statute. Briefly stated, that statute requires that if the parties are unable to agree, the stock be appraised at the fair value "as of the day prior to the date on which the vote was taken, without regard to any depreciation or appreciation thereof in consequence of the plan," with "such interest as the Court may find to be fair and equitable in all the circumstances." The Pennsylvania statute also provides for the costs and expenses of any such proceeding [but not legal fees] to be determined by the Court and assessed

against the corporation, subject to apportionment against dissenting shareholders under circumstances not relevant here. Expenses include reasonable compensation of appraisers, and if no offer was made, the Court may in its discretion, award to any shareholder compensation for any expert employed by the shareholder.

Amount of Damages

Compensatory damages will award the plaintiffs what would have been recovered had a proper election been made in timely fashion by the shareholder of record to pursue the remedies granted to a dissenting shareholder under the Pennsylvania statute. This the Court finds plaintiffs would have done had they received a proxy notice which was not misleading. There is no basis to assume that, as required by Pennsylvania law, Curtis would have made an offer to these plaintiffs in any amount. Defendant's defense of this litigation indicates otherwise, and it would be speculative to assume either that an offer would be made, or that if made, it would be accepted. Accordingly, the Court will attempt to fix the value in accordance with the Pennsylvania statute in the same fashion as that court would do had plaintiffs pursued

their aforementioned remedy there.

Plaintiffs' expert on valuation, Julius Anreder, is a qualified securities analyst. Since 1962 he has been employed at Gruss and Son as the Director of Research. He is a Chartered Financial Analyst, a member of the New York Society of Security Analysts, and a Registered Representative of the New York Stock Exchange. Anreder examined the prospectus for the Exchange offer, and also a similar prospectus furnished to holders of Curtis' debentures, whose assent to the plan of recapitalization was sought. These documents contain substantial financial information (Exhibits 2 and 7). He also relied on the annual reports of Curtis, and the result of an interview with Mr. SerVaas, Chief Executive Officer of Curtis, which took place on June 23, 1971.

Initially, Anreder took the view that under the peculiar circumstances affecting Curtis, which had endured severe financial difficulties in the recent past, the valuation of the common stock was the key issue; and that, in effect, so long as the common stock had value, the Prior Preferred Stock could be valued based upon consideration of the common stock value.

The Preferred Stock was callable at $65.00 per share,

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plus accrued dividends, which at the time of the recapitalization amounted to $30.75 per share. Under the plan as proposed, on a statistical or mathematical basis, the $4.00 Preferred was worth $4.80 immediately prior to the transaction, compared with the ...ing price of the common, while selling in the market for ...00. Any arbitrage between these disparate prices would, ...ver, depend upon knowledge to a certainty, that the plan of ...pitalization was going to be completed, an assumption apparently held by the totality of diverse opinion which makes the market.

Moreder also considered the fact that Curtis had a ...lty agreement with respect to property at Timmins, Canada, ...d to Texas Gulf Sulphur Company for the mining of various ores. ...is famous property has produced more litigation than minerals. ...g. Securities and Exchange Commission v. Texas Gulf Sulphur Co., ... F.Supp. 262 (S.D.N.Y. 1966), aff'd in part and rev'd in part, ...01 F.2d 833 (2d Cir. 1968) (en banc), on remand, 312 F.Supp. 77 (S.D.N.Y. 1970), aff'd in part and rev'd in part, 446 F.2d 1301 (2d Cir.), cert. denied 404 U.S. 1005 (1971); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied 404 U.S. 1004 (1971); Astor v. Texas Gulf Sulphur Co., 306 F.Supp. 1333 (S.D.N.Y. 1969); Fink v. Coates, 323 F.Supp. 988 (S.D.N.Y. 1971).]

The Timmins property was carried at nominal value on Curtis' financial statements (see Exhibit 11, p.2). Curtis had an appraisal in its possession which suggested in the opinion of the experts preparing the appraisal that Curtis' mineral royalty had a market value of between $2,000,000.00 and $4,400,000.00. Ultimately, in 1974 these rights were sold for $1,000,000.00 in cash.

Anreder relied primarily on the market price of the common stock. As part of his efforts to value the stock, Anreder assumed a hypothetical recapitalization. He first testified that there was no necessity for Curtis to have any plan of recapitalization in order to be maintained as a going business. But he testified that in order to arrive at a valuation in his own mind, it was necessary to assume a hypothetical plan. The Court ruled at the trial that there was no basis in fact for any hypothetical plan, and that the hypothetical plan was not competent evidence of value, and could not be used to support a theory of valuation. The Court adheres to that ruling. See Sparkill Realty Corporation v. State, 268 N.Y. 192 (1935). See also United States v. Five Acres of Land, 50 F.Supp. 69 (E.D.N.Y. 1943).

Counsel withdrew the witness from the stand overnight,

and he returned the following day to give valuation testimony based on a different theory. The Court ruled (Tr. p.102) that the expert witness could consider and testify with respect to all the relevant factors, including the liquidation rights, the yield, the foreseeable likelihood that the cumulative dividends would be paid, the foreseeable future prospects of the company, and whether it can stay in business, as well as market price.

In his revised approach, Anreder considered the fact that the Saturday Evening Post Magazine had been reintroduced to the public in 1971 on a quarterly basis and had about reached break-even point in the first quarter of 1972. Historically, it was the failure, due to changing times, of this and other magazines which dragged Curtis down to its low financial condition prior to the recapitalization. He found that the historical market price of the $4.00 Preferred was $4.65 over the prior 18 month period, and furthermore, that disallowing the interest charge for the debentures, which was contingent and not being paid, the company itself was practically operating on a break-even basis. Anreder testified, and I find, that the company was "not in the position of having the wolf at the door ... that they could keep the company ... going, until the Saturday Evening Post took

off ... one of the [alternatives available to management] was to just continue operating the company." (Tr. p.122).

The witness considered that progress had been made under the capable leadership of Mr. SerVaas, who had achieved outstanding business success in an unrelated industry. Substantial litigation affecting the company had been settled, and the balance sheet had been streamlined. In an interview with Anreder on June 23, 1971, SerVaas expressed the opinion that "the company is now not losing money and that he can keep it going indefinitely." (Tr. p.216).

Curtis received an appraisal of the Timmins mining property dated June 16, 1971, prepared by Albert J. Grisser Company. The annual report of Curtis for 1973 (Exhibit 11) shows that Curtis commissioned the making of the report or appraisal and adopted it at least to the extent that it referred to the report in its annual report to shareholders and presented it as valid opinion. Under the circumstances of this case the Court regards the mining appraisal, at least to the extent of the lower end of the range of value, or $2,000,000.00, as an adopted admission against interest binding on Curtis. This may bear upon the net

worth of the corporation, but simply because a publishing company owns a mining royalty, not producing any ore, which has a particular value, does not necessarily transmit itself directly and pro tanto to the value of its various issues of stock. The presence of this non-productive and illiquid asset is however a factor which Anreder properly could and did consider in reaching his appraisal, and which the Court may consider. As noted supra, p.18, in 1974, Curtis sold the mining rights for $1,000,000.00. Anreder reached the conclusion that the shares were worth $15.00 a share.

Defendant's expert, Fred Shinagel, was likewise a qualified financial analyst. He examined the stock exchange records and the proxy statement as well as the exchange offer to the debentureholders of Curtis and the trading record in common and preferred stock for the year 1972. He considered the company short of working capital and noted that except for one year it had experienced no earnings for a ten year period. Its current assets virtually equalled its current liabilities, and its book value of common shares was negative to the extent of $13,000,000.00, because of accrued Preferred dividends and accrued unpaid debenture interest. He regarded Curtis as substantially insolvent and

believed that those whose interests were junior to the debentures would receive nothing in an immediate liquidation. Curtis' accountants had refused to render a firm opinion as to its financials, but the Court takes the financials as true for purposes of this litigation, there being no evidence to the contrary. Publication of such financials is at least an admission against interest by Curtis. Shinagel regarded the company as "virtually dead." (Tr. p.167). Before the Preferred arrearages could be paid, the income debentures had to be paid interest arrears of approximately $30.00 per $100.00 bond, amounting to $2,500,000.00.

Curtis had a very substantial tax loss carry forward and a large number of unsettled lawsuits, the existence of which, in Shinagel's view, diminished the value of the tax loss carried forward. He believed that the company was a "totally speculative medium" and had a total market value of $1 to $2 million dollars, and that without the conversion of debentures, the total ownership of the common stock was worth $1,000,000.00 (Tr. p.172). Because of the speculative aspects of the company's business, and its tax loss carry forward, these separate statements are not so inconsistent as they appear.

Implicit is a conclusion by defendant's expert that the company could have continued in existence at least until the maturity of the debentures. See Tr. p.178 at which the defendant's witness Shinagel assumes a value in the equity. The preference rights excluded the common stock, unless the company survived.

The highest value which can be substantiated by the market itself is $4.75 per share. The market showed a high of 4-3/4 in June 1972, before the proxy material was available, or the plan known. After the proxy material had been circulated, and in August, the stock hit a low of 2 1/8. The high and low during the first quarter of 1971 was $9.00 and $5.00, respectively. In 1970; 5-5/8 and 1-3/8, and in 1969; 32 and 5-7/8. In 1968 it was 43-1/4 and 23-7/8.

During the 18 month period prior to the recapitalization the volume of trades was relatively slight. This does not detract from a conclusion that market price reflected a consensus of the market makers as to the future prospects of Curtis, the likelihood that it would stay in business, and ultimately be in a position to pay its accrued dividends on the Preferred Stock. Although there is no doubt that it would take as much as a year to dispose of

12,000 shares during 1972 without unduly depressing the market, this factor is entitled to very slight weight because this appraisal is based upon the fair investment value of the stock, and the implicit assumption that the holder would have continued to hold the stock but for the plan of recapitalization.

> "[T]he theory of the dissenter's claim is that he desires a continuation of his investment unaffected by the change.
>
> The resultant valuations have generally concentrated on three principal elements: (1) net asset value; (2) market value; and (3) investment (or earnings) value. Most courts have considered all three...." 79 Harv.L.Rev. 1456-57, Valuation of Dissenter's Stock (1966).

See also 15 Fletcher Cyclopedia Corporations, 1973 Revised Volume, §7165.4, p.294:

> "The courts must determine the value of the shares of dissenting stockholders.... Appraisal must be upon a going concern basis rather than upon a liquidation basis.
>
> While there is no legal formula which can be enunciated or applied in valuation proceedings, the appraisal remaining a matter of judgment on the facts in each case, the court can reiterate accepted principles, which simply stated, are that the appraisal should take account of market value, investment value, and net asset value."

Prior to 1971, Curtis had sold or otherwise disposed of

the major portion of its properties, and the remaining business of the company, operated by a wholly owned subsidiary on December 31, 1971, and at the time of the meeting, consisted of the publication of Holiday Magazine, Jack and Jill Magazine and the revived quarterly publication, Saturday Evening Post. As previously noted, these magazines had a profit for the three months ending March 31, 1972, having suffered substantial losses in the three prior years. The company had had an operating loss for all recent fiscal periods to the date of the meeting, except that it earned $.31 per common share in 1971 due to extraordinary items, resulting from the sale of fixed assets at prices greater than book value. Under its system of accounting, all expenses attributable to publications were considered as a period cost, and expensed when incurred, but revenues were recorded upon publication of an issue.

While the respective experts agree on many of the underlying facts, which the Court, as previously noted, accepts as true, their ultimate conclusions differ substantially. Defendant's expert's conclusion that stock selling at $4.75 per share within a reasonable time prior to the announcement of the plan had a value

of only $.50 must be rejected as unfounded and unreasonable. Plaintiffs' expert attempted to distill from all of the relevant facts, based upon his judgment and experience, a fair or intrinsic value of $15.00 per share.

The Court regards this figure as a reasonable appraisal of the stock under all of the circumstances, and has attempted to test it by time honored principles of valuation. Although Curtis had been unable to pay any dividends on its common stock since 1960, and was in arrears on its $4.00 Preferred for approximately ten years, the Preferred had sold during 1969 at a high of $32.00 per share, and in 1968 at a high of $43.25 per share. The entire record justifies a conclusion that but for the recapitalization, Curtis could have continued in business at least until October 1, 1986, when an act of default most likely would have occurred with respect to the debentures.[3/] The experts agree that the common stock had value. A fortiori, so did the Preferred. Curtis' prognosis for the balance of the period was more favorable than that of the recent past. In 1986 Preferred shareholders would have been entitled to their redemption price of $65.00, and accrued dividends of $69.75, which they would have received on a liquidation after the debentureholders, assuming the common stock had any value

in 1986, and assuming as we must, that when the debentures came due, or earlier, Curtis would either have to liquidate, or develop some acceptable alternative to liquidation.

Taking a per share value in 1986 for the Preferred Stock including accrued cumulative dividends of $134.75, we turn to Table B in 26 C.F.R. §20.2031-10, a table promulgated by the Department of the Treasury showing the present worth at 6% of a remainder interest postponed for a term certain. The discounted factor for the value of such a remainder interest is .468839, leading to a discounted present value at the end of 1972 of $63.1

This computed figure must be reduced substantially to allow for a foreseeable contingency, that is the failure, dissolution or bankruptcy of this speculative enterprise, prior to the scheduled day of reckoning with the debentureholders. Conservatively, Curtis had a 25% likelihood of survival and full payment. Such an assumption is not unreasonable under the circumstances of this case, and would lead to an assumed current market value of $15.80, which is so close to the expert opinion expressed by the witness Anreder as to exclude cavil.

Accordingly, the Court finds the actual value of

plaintiffs' shares on September 13, 1972 to be $188,400.00 [12,560 x $15.00], for which sum plaintiff Mr. Oscar Gruss shall have judgment. Plaintiff Gruss and Son is entitled to no relief. To the foregoing sum we add a reasonable allowance of $1,500.00 for the appraiser's services. Mr. Shinagel's appraiser's fee, negotiated at arms length, was $750.00 per day. The Court considers Anreder's ability and qualifications substantially equal to those of Shinagel. Although the witness spent two days in Court, his work reasonably should have required no more than a total of two days for study and testimony.

There remains for consideration the question of pre-judgment interest. Defendant rejected plaintiffs' demand on September 22, 1972, and the Court believes that had defendant honored plaintiffs' demands for the appraised value, which presumably it would have done had plaintiffs complied with the Pennsylvania statute, defendant would have required a period of approximately 90 days following September 22, 1972 to effect appraisal and payment. Accordingly, plaintiff, Mr. Oscar Gruss, shall recover pre-judgment interest on the sum of $188,400.00 from December 21, 1972 until the date of entry of judgment, together with those costs customarily taxable in this Court in actions at law.

Second Claim

Plaintiffs, as previously noted, failed to comply with the Pennsylvania statute aforementioned because the objection was not executed by the holder of record. Defendant is entitled to judgment on the second cause of action pleaded.

Conclusion

The parties may, if so advised, provide in the final judgment which shall be settled on five (5) days notice that plaintiffs shall deposit the original stock certificates, in good form for transfer, with the Clerk of this Court, to be delivered to defendant for cancellation when the judgment is satisfied.

The foregoing constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 52, F.R.Civ.P.

Dated: New York, New York
March 21, 1975

CHARLES L BRIEANT, JR

CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E S

1. Although this interest was fully cumulative and payable in any event at maturity of the debentures on October 1, 1986, no interest was required to be paid unless current net income of the preceding calendar year was sufficient to do so. Curtis was prohibited from paying cash dividends on any other class of stock until all interest payments on the debentures were current, but had not committed any act of default which would accelerate debenture principal, or cause Curtis to be bankrupted.

2. Section 504 of the Pennsylvania Business Corporation Law provides in effect that a proxy may be revoked by notice to the Secretary of the corporation at any time before the vote is taken. At p. 8 of the proxy statement, shareholders were informed that revocation must be by written notice. If so, the notice of revocation in this case was sufficient because of the receipt of Exhibit 1 and its enclosure by Curtis prior to the meeting.

3. On October 1, 1986 the principal and contingent interest on the debentures became due and enforceable.

APPENDIX C

Memorandum and Order

[Supplemental Findings]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR GRUSS and OSCAR GRUSS & SON,

Plaintiffs,

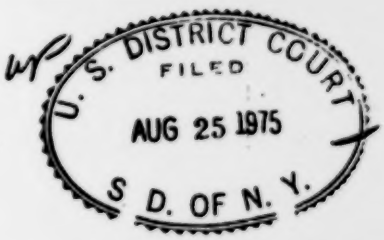
-against-

THE CURTIS PUBLISHING COMPANY,

Defendant.

73 Civ. 282-CLB

MEMORANDUM AND ORDER
[SUPPLEMENTAL FINDINGS]



Brieant, J.

Reargument is granted. Upon reargument the prior decis of the Court dated March 21,1975 is adhered to. The following Supplemental Findings of Fact and Conclusions of Law are stated pursuant to Rule 52(b), F.R.Civ.P.

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1. No scienter, or wilful intent to damage or defraud was proved against defendant. No such proof is necessary. A finding of negligence is sufficient to impose liability under §14(a). Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1298-301 (2d Cir. 1973).

The Court, in describing the proxy statement as a "trap for the unwary", did not intend thereby to make a finding of scienter. That phrase is well known to the common law in the context of negligence. See Coleman v. Robert Graves Co., 39 Misc. 85, 78 N.Y.S. 893, 895 (Sup. Ct., Kings County 1902).

2. Defendant breached several duties imposed by rules, cited in the prior opinion, having the force of statute. Such breach of statutory duty is negligence per se. If it is not negligence per se, it is, under the circumstances of this case, strong evidence of negligence, and the Court finds negligence on the part of defendant which was the proximate cause of plaintiff's foreseeable damages.

3. If the negligence was that of defendant's attorneys in preparing the proxy materials, such negligence is imputed to defendant under familiar principles of the law of agency.

4. The statutory duties referred to in the aforementioned decision are non-delegable, and defendant is responsible for any omission by its agents or attorneys.

5. Plaintiffs and their agent Anreder exercised reasonable care and were not guilty of contributory negligence.

6. No basis exists at this time to receive the testimony of SerVaas, proffered by affidavit and bearing on the credibility of the witness Anreder. No justification appears for the failure to call

SerVaas as a witness at the original trial of the action. It is not newly discovered evidence.

7. The personal motivation or animus, if any, of Gruss, Anreder or both of them is not relevant to the issues in this case. Gruss wanted to exercise his appraisal rights and would have done so but for defendant's violations of Rules 14a-9 and 101 Item 2.

8. In its enforcement of the rights of security holders in a publicly-held Pennsylvania corporation, which rights exist pursuant to federal securities law this Court is not limited directly or indirectly by procedural efforts of Pennsylvania state courts to "render the unwieldy, wieldable", In re Watt & Shand, 304 A.2d 694, 698 (Pa. Sup. Ct. 1973). If defendant desired to try the valuation according to such procedural rules, it should have waived the irregular exercise of the dissenting proxy, removed the foot of Gruss from its "trap for the unwary", and remitted him to an appraisal proceeding in state court.

9. This Court, in computing the damages suffered plaintiff, applied the per share valuation figure suggested by plaintiff's expert. The Court found the opinion of plaintiff's expert to be supported by the

evidence, and the considerations and implications flowing therefrom. Then, this Court tested the merits of plaintiff's expert's opinion by computing the present worth at 6% interest of the right to receive $134.75 per share postponed for thirteen years, and then reducing that mathematical result by a consideration of the likelihood of such payment. The Court, upon reconsideration, finds no inconsistency between its finding that plaintiff's expert's opinion was correct and accurate, and its finding that "[c]onservatively, Curtis had [at least] a 25% likelihood of survival and full payment."(Findings and Conclusions, March 21,1975, p.27).

Defendant's motion to amend the Court's findings of fact and conclusions of law other than as aforesaid, and to amend the judgment, are, in all respects, denied.

So Ordered.

Dated: New York, New York
August 25, 1975

Charles L. Brieant Jr

CHARLES L. BRIEANT JR.
U. S. D. J.

APPENDIX D

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

OSCAR GRUSS and OSCAR GRUSS & SON,

Plaintiffs,

- against -

THE CURTIS PUBLISHING COMPANY,

Defendant.

- X

73 ~~Civ.~~ 282

CLB

JUDGMENT

#75,306

This action came on for trial without a jury on October 10 and 11, 1974 before the Court, Honorable Charles L. Brieant, District Judge, presiding, and the issues having been duly tried and a decision having been reserved and Findings of Fact and Conclusions of Law having been rendered on March 21, 1975

IT IS ORDERED AND ADJUDGED

That plaintiff OSCAR GRUSS recover of defendant THE CURTIS PUBLISHING COMPANY the sum of ONE HUNDRED EIGHTY EIGHT THOUSAND FOUR HUNDRED ($188,400) DOLLARS,with interest thereon at the rate of six (6%) per cent per annum as provided by law, from December 21, 1972 to the date of entry of this judgment, (April 9, 1975), in the sum of TWENTY FIVE THOUSAND NINE HUNDRED EIGHTY-THREE and 71/100 ($25,983.71) DOLLARS, making a total sum of TWO HUNDRED FOURTEEN THOUSAND THREE HUNDRED EIGHTY-THREE and 71/100 ($214,383.71) DOLLARS together with the costs of this action to be taxed; and

That plaintiff OSCAR GRUSS also be granted an allowance of ONE THOUSAND FIVE HUNDRED ($1,500) DOLLARS for appraiser's services; and

That plaintiff OSCAR GRUSS & SON take nothing and that the action as to it be dismissed on the merits; and

MICROFILM

That the plaintiffs deposit original stock certificates, representing 12,560 shares of the $4.00 Dividend Series, Preferred Stock of defendant, which are registered in the name of plaintiff OSCAR GRUSS & SON, in good form for transfer, with the Clerk of the Court, to be delivered to defendant for cancellation when this judgment is satisfied.

Dated at New York, New York,
this 9th day of April, 1975

Charles L. Brieant Jr.
U.S.D.J.

JUDGMENT ENTERED - 4/10/75
Raymond J. Burghardt
CLERK

APPENDIX E

Relevant Statutes, Rules and Regulations

RELEVANT STATUTES, RULES & REGULATIONS

28 U.S.C., 1332

(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) citizens of different states...

(c) for the purpose of this section and section 1441 of this title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business.

Pennsylvania Business Corporation Law

Section 2(18) "Shareholder" means a registered owner of shares in a business corporation. The term "shareholder shall be construed to include "member" if the corporation does not issue shares. If and to the extent the articles confer rights of shareholders upon holders of securities evidencing indebtedness, or governmental or other entities pursuant to section 309.1 of this act, the term shall be construed to include such security holder, and governmental or other entities.

Section 515. Rights of Dissenting Shareholders

A. If any shareholder of a business corporation objects to any proposed plan of action of such corporation authorized under any section of this act and such section provides that such shareholders shall be entitled to the rights and remedies of dissenting shareholders, such shareholder shall be entitled to the following rights and remedies:

B. If any shareholder of a business corporation shall file with such corporation, prior to the commencement of the voting by shareholders upon the plan at the meeting of shareholders at which a plan is submitted to a vote, a written objection to such plan and shall not vote in favor thereof and such shareholder, within twenty days after the date on which the vote approving the plan was taken, shall also make written demand on the corporation or the surviving or new corporation resulting from the plan for the payment of the fair value of his shares, such corporation shall pay to such shareholder the fair value of this shares, as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan upon surrender of the share certificate or

certificates representing his shares. Neither a proxy nor a vote against the plan shall constitute such a written objection. The demand of the shareholder shall state the number and class and series, if any, of the shares owned by him with respect to which he dissents. A dissenting shareholder may dissent as to all or less than all of those shares registered in his name of which he is not the beneficial owner but there may not be dissent with respect to some but less than all shares of the same class or series owned by any given beneficial owner of shares, whether or not the shares so owned by him are registered in his name. Unless a shareholder files such written objection and also makes such demand within the twenty-day period, he shall be conclusively presumed to have consented to the plan and shall be bound by the terms thereof. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder as to the shares with respect to which he dissents.

C. No such demand may be withdrawn unless the corporation shall consent thereto. If, however, such demand shall be withdrawn upon consent, or if the

proposed plan shall be abandoned or rescinded, or the shareholders shall revoke the authority to effect such plan, or if no demand or petition for the determination of fair value by a court shall have been made or filed within the time provided in this section, or if a court of competent jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section, then the right of such shareholder to be paid the fair value of his shares shall cease and his status as a shareholder shall be restored retroactively without prejudice to any corporate proceedings which may have been taken during the interim.

D. Within thirty days after such plan became effective, the corporation or, in the case of a merger or consolidation, the surviving or new corporation, deomestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as herein provided and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by such corporation to be the fair value thereof. Such notice and offer shall be accompanied by a balance sheet of the corporation

as of the latest available date and not more than twelve months prior to the making of such offer, and a profit and loss statement of such corporation for the twelve months' period ended on the date of such balance sheet.

E. If, within sixty days after the date on which such plan became effective, the fair value of such shares is agreed upon between any such dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which such plan became effective, upon surrender of the certificate or certificates representing such shares. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares.

F. A dissenting shareholder who is unable to agree with the corporation on the fair value of his shares may demand proceedings to value his shares at any time after sixty days and within ninety days after the date on which the plan became effective. Within thirty days after receipt of any such written demand, the corporation shall, or at its election at any time after sixy days and within ninety days after the effective date the

corporation may, file a petition in the court of common pleas in the county in this State where the registered office of the corporation is located, praying that the fair value of such shares be found and determined. If, in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this State such petition shall be filed in the county where the registered office of the domestic corporation was last located, which county shall be deemed to be the county where the cause of action arose, and all process shall be served upon such foreign corporation as provided in section 1011 of this act. If the corporation has not instituted the proceeding as herein provided, any dissenting shareholder may do so in the name of the corporation at any time within thirty days after the expiration of such ninety day period. All dissenting shareholders, wherever residing, shall be made by the corporation parties to the proceeding as an action against their shares quasi in rem. A copy of the petition shall be served on each dissenting shareholder who is a resident of this State and shall be served

personally or by registered or certified mail on each dissenting shareholder who is a nonresident. The jurisdiction of the court shall be plenary and exclusive. All shareholders who are parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares as of the day prior to the date on which the vote was taken without regard to any depreciation or appreciation thereof in consequence of the plan. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as shall be specified in the order of their appointment or an amendment thereof. The judgment shall be payable only upon, and concurrently with, the surrender to the corporation of the certificate or certificates representing such shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares.

G. The judgment shall make due allowance for any distribution to the shareholders between the day before the date of the vote on the plan and the date of

their demand for the fair value of their shares, and for such interest as the court may find to be fair and equitable in all the circumstances.

H. The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed, as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares, if the court shall find that the action of such shareholders, in failing to accept such offer, was arbitrary or vexatious or not in good faith. Such expenses shall include reasonable compensation for and reasonable expenses of the appraisers, but shall exclude the fees and expenses of counsel for, and experts employed by any party, but if the fair value of the shares, as determined, materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts employed by the shareholder in the proceeding.

I. Within twenty days after demanding payment for his shares, each shareholder demanding payment shall submit the certificate or certificates representing his shares to the corporation for notation thereon that such demand has been made. His failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of competent jurisdiction, for good and sufficient cause shown, shall otherwise direct. If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear similar notation together with the name of the original dissenting holder of such shares and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

J. Shares acquired by a corporation pursuant to payment of the agreed value therefor or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

K. Any shareholder who desires to object to or to dissent from any proposed plan authorized under any section of this act and where this act provides that shareholders so objecting or dissenting shall have the rights and remedies herein provided, shall be limited to the rights and remedies prescribed under this section, and the rights and remedies prescribed by this section shall be exclusive.

L. Except as otherwise provided in subsection M of this section or in the articles or in the resolution of the board of directors submitting a proposed plan of action to the shareholders, this section shall not apply (1) to the shares of any class, which, at the record date fixed to determine the shareholders entitled to notice of and to vote at the meeting at which the plan is to be acted on, or on the date of such meeting, if no record date has been fixed, are either (i) listed on the New York Stock Exchange or the American Stock Exchange, or (ii) held of record by not less than two thousand five hundred shareholders; nor (2) to any of the shares of a corporation which is a party to a plan of merger if, pursuant to section 902.1 of this act, the plan does not require the approval of the shareholders of the corporation.

M. Clause (1) of the subsection L of this section shall not apply to:

(1) An amendment to which section 810 of this act is applicable.

(2) Shares converted by a plan, if such shares are not converted solely into shares of the acquiring, surviving, new or other corporation or soley into such shares and cash in lieu of fractional shares; and

(3) Shares of any preferred or special class, unless articles or the plan entitles all shareholders of such class to vote thereon and requires for the adoption of the plan the affirmative vote of shareholders of such class entitled to cast at least a majority of the votes which all shareholders of such class are entitled to cast thereon (Amended by A. 216, L. '68, eff. 8-19-68 and A. 361, L. '68, eff. 12-2-68 retroactive to 8-19-68).

Section 810. Rights of Dissenting Shareholders Upon Certain Amendments.

If any amendment to the articles shall (1) cancel or otherwise affect the right of holders of the shares of any class outstanding on or before January 1, 1969, to receive dividends which have accrued but have not been declared, or (2) eliminate cumulative voting for directors of a business corporation, the holder of any outstanding

shares the accrued dividends or cumulative voting rights of which are so cancelled, affected or eliminated, who shall object to such amendment and comply with section 515 of this act shall be entitled to the rights and remedies of dissenting shareholders therein provided. There shall be included in or enclosed with the notice of a meeting of shareholders, called to consider an amendment to which this applies, a copy of this section and of section 515 of this act.

Section 14(a) of the Securities Exchange Act of 1934

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of its name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

S.E.C. Regulation 240.14(a), schedule 14A, item 2.

Outline briefly the rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights. Where such rights may be exercised only within a limited time after the date of adoption of a proposal, the filing of a charter amendment or other similar act, state whether the person solicited will be notified of such date.

Instruction. Indicate whether a security holder's failure to vote against the proposal will constitute a waiver of his appraisal or similar rights or whether a vote against the proposal will be deemed to satisfy any notice requirements under state law with respect to appraisal rights. If the state law is unclear, state what position will be taken in regard to these matters.

S.E.C. Rule 14a-5(a)

The information included in the proxy statement shall be clearly presented and the statements made

shall be divided into groups according to subject matter and various groups and statements shall be proceeded by appropriate headings. The order of item and subitem in the schedule need not be followed. Where practicable and appropriate, the information shall be presented in tabular form. All amounts shall be stated in figures. Information required by more than one applicable item need not be repeated. No statement need be made in response to any item or subitem which is inapplicable.

S.E.C. Rule 14a-9(a)

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material in fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meaning or subject matter which has become false or misleading.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-247

OSCAR GRUSS and OSCAR GRUSS & SON,

Petitioners,

vs.

THE CURTIS PUBLISHING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

All opinions below are as set forth in the appendix to the petition herein.

JURISDICTION

Jurisdiction is as stated in the petition.

QUESTIONS PRESENTED

1. Did petitioners comply with the procedures mandated by the Pennsylvania Business Corporation Law for the exercise of appraisal rights?

2. Did petitioners prove that the portion of respondent's proxy statement dealing with appraisal rights, including the printing of the relevant statutes, was false and misleading under the standard of materiality imposed by this Court and by the United States Court of Appeals for the Second Circuit?

STATUTES, RULES AND REGULATIONS INVOLVED

The statutes, rules and regulations involved are those which are set forth in the opinion of the Court of Appeals and elsewhere in the appendix to the petition.

STATEMENT OF THE CASE

The facts and proceedings below are fully and fairly summarized in the opinion of the Court of Appeals appended to the petition at pages 1a through 9a and reported at 534 F.2d 1396. The Statement of the Case set forth in the petition is argumentative, inaccurate and incomplete. Rather than repeat the facts as accurately summarized by the Court of Appeals, respondent respectfully directs the Court's attention to such summary and requests that the Court disregard petitioners' statement to the extent that it differs. However, respondent would like to offer the following comments in response to certain statements set forth by petitioners, as follows:

(a) The reason ascribed by petitioners to their decision to commence an action in the federal court (P5a)* is not only argumentative and conjectural, but is also illogical. The so-called "State claim" was not in the nature of a valuation proceeding under the Pennsylvania Business Corporation Law, but was a

* Page references prefixed with letter "P" refer to appendix to petition.

demand for relief on the ground that respondent had violated that statute by refusing to pay the fair value of the shares. Accordingly, the cause of action could not have been premised on petitioners' inability to predict what the Pennsylvania courts would do. Furthermore, petitioners alleged full compliance with the Pennsylvania statute in their State claim, an allegation which, as will be discussed elsewhere, they did not and were unable to prove.

(b) Petitioners, on pages 6 and 7 of their petition, confuse the holdings of the Court of Appeals and the bases therefor. The grounds for the determination of the two causes of action in favor of respondent were entirely separate and distinct. The State claim was rejected because petitioners had failed to prove that they had been deprived of their appraisal rights under the Pennsylvania Business Corporation Law. The federal claim was rejected because the proxy material had not been shown to be false and misleading. The rejection of one claim in no way mandated or even suggested the upholding of the other claim. Petitioners' description thereof only serves to obfuscate the issues. Furthermore, the Court of Appeals did not find that petitioners' appraisal rights had veen violated, as petitioners state.

(c) On page 8 of the petition, petitioners state that "the appraisal rights had not been time barred and nothing in the record supports the Court of Appeals' surmise that they had." This statement is untrue. As is discussed in detail in this brief, petitioners' rights had in fact been time barred because petitioners had failed to serve a demand required under the Pennsylvania Business Corporation Law and had failed to commence a valuation proceeding thereunder, both of which acts had to be performed within certain specified time periods. Inasmuch as the relevant statute is a part of the record herein, the statement of the Court of Appeals is both correct and supported. Incidentally, in that connection, respondent at no time made any concession respecting petitioners' compliance

with any of the requirements of the appraisal statute beyond the initial notice and demand. The limited and restricted nature of respondent's concession, to the extent that there was a concession at all, is clearly and specifically spelled out in the transcript of the trial (A98-104).

For the sake of facilitating the Court's consideration of this matter, all page references by respondent to the opinion of the Court of Appeals and to other underlying documents shall be to the appendices to the petition herein, unless otherwise noted.

REASONS FOR DENYING THE WRIT

I.

Petitioners misconstrue the basis of the Court of Appeals' decision with respect to the Pennsylvania Business Corporation Law.

The Court of Appeals reversed the judgment below on two grounds; first, that petitioners failed to show that they had been deprived of their appraisal rights under the Pennsylvania Business Corporation Law (P6a), and second, that petitioners failed to show that the Proxy Statement was false and misleading (P7a). This point is intended to respond to petitioners' argument respecting the former ground.

Petitioners' entire argument addressing this ground is based upon its assumption that the Court of Appeals reversed solely because it was disturbed that petitioners had failed to use the Pennsylvania courts. This assumption is completely incorrect. What the Court of Appeals determined was that the petitioners had failed to prove compliance with the requirements

enumerated in §515 of the Pennsylvania Business Corporation Law and had failed to commence a valuation proceeding thereunder. The court specifically held that the petitioners had failed to show that they were "in fact deprived of the appraisal rights accorded by the Pennsylvania Business Corporation Law." (P6a).

Appraisal rights are not ordained in heaven. They are afforded to shareholders under the relevant statute of the state of incorporation. In order to exercise these rights, shareholders must comply with the requirements of that statute, a fact that is conceded by petitioners on page 13 of their petition. In this case, the petitioners failed to establish that they had complied with the statute, for the simple reason that they had not done so.

Under §515, in order for a shareholder to obtain the fair value of his shares through a court proceeding, he must do the following:

(a) File a written objection to the Plan (§515B, P47a). Petitioners attempted to comply with this requirement, but did so through notice by the beneficial owner rather than the record holder. This error is proven by reason of the written objection itself (P5a, n. 4), which states that "I am the beneficial owner," and is conclusively established by the direct concession thereof at the trial by petitioners' witness (86a, Joint Appendix on Appeal). The lower court found that the objection was improperly exercised, while the Court of Appeals indicated that a Pennsylvania court might disagree.

(b) Make a written demand for payment within twenty (20) days after the vote (§515B, P47a). Petitioners attempted to do so.

(c) If no agreement has been reached as to fair value, then, between sixty (60) and ninety (90) days after the effective date of the plan, the shareholder should demand valuation proceedings

(§515F, P50a). Petitioners neither made nor attempted to make this demand. A reading of the statute makes it clear that such demand is an absolute prerequisite to the institution of valuation proceedings. Accordingly, the Court of Appeals was completely correct in its determination that petitioners failed to show that they were deprived of their appraisal rights and, indeed, went "rushing into the federal court in New York" (P7a).

(d) If, after the demand described in sub-paragraph "(c)" above, the corporation fails to commence a valuation proceeding, the shareholder can do so in the Pennsylvania courts within thirty (30) days after the expiration of the ninety (90) day period. Again, petitioners failed to comply with this prerequisite. No valuation proceeding was ever commenced by petitioners in state or federal court.

The statutory requirements and the conduct of petitioners, as described above constitute the gist of the decision of the Court of Appeals. In their haste to leave the State of Pennsylvania for the possibly greener pastures of New York, petitioners neglected to perform the acts which they were required to perform under Pennsylvania law. Having failed to do so, they were thereafter time-barred. Therefore, petitioners could not and did not prove, as they alleged in Paragraph 25 of their complaint (the Pennsylvania cause of action), that they "fully complied with all the requirements of Sections 1515 and 1810 (sic) of the Pennsylvania Business Corporation Law and thus are entitled to receive the fair value of their shares pursuant thereto" (11a, Joint Appendix on Appeal). In order for petitioners to prevail, they would have to have shown that they had made the necessary demands, had commenced the valuation proceeding described by the statute, and had somehow been deprived of their rights thereunder. Petitioners might have attempted to commence the valuation proceeding itself in the federal court in conjunction with their cause of action under the Securities Exchange Act of 1934, under the theory of pendent jurisdiction, although the Pennsylvania statute is explicit in its statement that the jurisdiction of the Pennsylvania Court of Common Pleas is

"plenary and exclusive" (P4a). However, the commencement of such a cause of action would have to be in compliance with both the time and procedural requirements of the Pennsylvania Business Corporation Law, neither of which were met. Furthermore, the cause of action as stated in petitioners' complaint was clearly not a valuation proceeding under the statute, but was instead a plea for relief due to the alleged deprivation of their rights under such statute. As the Court of Appeals held, the petitioners apparently assumed that they would lose the valuation proceeding and rushed off to federal court in New York without bothering to comply with the Pennsylvania Business Corporation Law.

II.

The Court of Appeals' holding that petitioners failed to show that the Proxy Statement was false and misleading was proper and was in harmony with applicable precedent.

Petitioners argue that the Court of Appeals' decision jeopardizes the ability of dissenting shareholders to exercise their appraisal rights. This argument is wholly without merit. Any shareholder who properly exercises his appraisal rights in compliance with the applicable and relevant statute will be in no way affected or jeopardized by this decision. Petitioners, in making this argument, avoid reality and completely ignore the facts of this case: that one petitioner is a sophisticated brokerage house and the other a general partner thereof; that respondent used the identical material respecting appraisal rights commonly used by Pennsylvania attorneys and corporations; and that petitioners were the only parties who have ever claimed to have been misled by such material, not only in this instance but apparently throughout the history of Pennsylvania corporations. Furthermore, the Court of Appeals' decision is directly in keeping not only with the standard of materiality previously adopted by the Second Circuit in *Gerstle v. Gamble-Skogmo, Inc.*, (478 F.2d 1281 (1973)) but also with the Supreme Court's decision in *Mills v. Electric Auto-Lite Co.*, (396 U.S. 375 (1970))

and its recent affirmation of the *Gerstle* interpretation in *TSC Industries, Inc. v. Northway, Inc.*, (Docket No. 76-1471, June 14, 1976).

In conclusion, it must be pointed out that the "manifest injustice" to which petitioners refer was neither as manifest nor as much of an injustice as they claim. To begin with, under the decision of the Court of Appeals petitioners will now receive the common shares of respondent under the same formula as was used in the initial reorganization plan. They will, therefore, be in the same position as the scores of shareholders of respondent who voted affirmatively for that plan. Secondly, it was not respondent who caused petitioners to wait until the last possible moment to attempt to exercise the appraisal right, and then, perhaps caused by their haste or perhaps merely by their carelessness, to do so in an improper fashion. Thirdly, respondent had no hand in the determination of petitioners to ignore the clear and simple statutory requirements of the Pennsylvania Business Corporation Law and, perhaps with visions of sugar plums and dollar signs dancing in their heads, to dash off to New York for the purpose of obtaining jurisdiction there. In view of the incredible valuation found by the District Court (see comment of Judge Friendly, P6a, Note 7), petitioners anxiety was understandable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

s/ Theodore L. Marks
Attorney for Respondent